Feature

KEY POINTS

- The legal framework relating to Authorised Push Payment Fraud (APP fraud) is not fully settled.
- *I.F.T S.A.L Offshore v Barclays Bank PLC* [2020] EWHC 3125 (Comm) illustrates that the courts will be prepared, in appropriate cases, to allow a claimant to use documents obtained from a bank in a Norwich Pharmacal application for the purposes of bringing a claim against the bank itself.
- Customers currently face an uphill battle in establishing that a bank is liable for breach of the duty of care established in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All E.R. 363, for breach of statutory duty or for dishonest assistance.

Authors David McIlroy and Ruhi Sethi-Smith

Prospects for bankers' liability for authorised push payment fraud

Authorised push payment fraud (APP fraud) is a form of fraud where the victim is induced to initiate a fraudulent transaction. Despite this type of fraud costing customers nearly £1/2bn a year, English law does not offer a clear and co-ordinated response. This article examines the implications of the recent cases *including I.F.T S.A.L Offshore v Barclays Bank PLC, Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* and *Philipp v Barclays Bank UK Plc*, in order to identify the prospects for defrauded customers seeking to recover damages against the banks through whom their funds were paid away.

APP FRAUD

The case of *I.F.T S.A.L Offshore v Barclays Bank PLC* concerned an authorised push payment fraud (APP fraud). According to UK Finance, in 2019, a total of 114,731 personal customers were victims of APP fraud, losing a total of £317.1m. 7,706 businesses were also victims of APP fraud, losing £138.7m. The problem is a significant one, especially for individuals who are targeted by increasingly sophisticated fraudsters.

The fraudster committing APP fraud contacts the victim and persuades the victim to make a payment to a bank account controlled by the fraudster. Sometimes the victim is told that a genuine payee has changed their bank details, other times the victim is told that their funds are at risk of fraud and that the police/their bank/ a regulator is advising them to move them to a safe account. The fraudster has often opened a new bank account for the specific purpose of receiving the payment. The fraudster withdraws the funds from the bank account shortly after they have been received. The money having gone, the victim's only hope of finding the fraudster is through the details held by the bank which opened the account into which the victim's funds were paid.

The speed with which payors and payees expect payments to be made, even cross-border, makes it very difficult for APP fraudsters to be caught in the act or for stolen funds to be recovered after the event. I.F.T. S.A.L. Offshore (IFT) instructed its French bank to pay US$249,721.44 to an Austrian supplier from whom it was purchasing raw meat products. It had, however, been given the fraudster's bank details. The payment made by IFT's French Bank on 15 January 2019 was sent to an account at Barclays Bank plc (Barclays) which the fraudster had set up especially for the purpose. The fraudster then transferred the money out of the Barclays account and into an account in the United Arab Emirates. IFT discovered the fraud three days later, and, through its French bank notified Barclays of the fraud and requested repayment of the money on 18 January 2019. Too late. The money had already been withdrawn by the fraudster.

NORWICH PHARMACAL APPLICATIONS

IFT made a Norwich Pharmacal application for the disclosure of documents from Barclays to reveal details of the fraudster's account. A Norwich Pharmacal application (named after *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] A.C. 133, HL, in which the jurisdiction of the court to make such orders was established), is an order made against someone who, because their own actions have facilitated a wrong, ought to provide to a victim the information about the wrongdoer's identity which they hold, even though they themselves are not the likely target of litigation by the victim. Banks frequently find themselves in this position and, being bound by duties of confidentiality to their customers which a court order can override, often disclose the information sought by victims only once a Norwich Pharmacal order has been made.

Because the Norwich Pharmacal jurisdiction is usually exercised in support of a party other than the one giving disclosure, the standard undertaking given by the applicant is an undertaking that the applicant will not, without the permission of the court, use any of the documents or information obtained as a result of an order granted, except for the purposes of the proceedings originally contemplated.

Barclays was ordered to provide IFT with the information it held about the fraudster. Upon reviewing that documentation, IFT felt that it had grounds for pursuing Barclays in relation to the fraud. IFT therefore applied to the court and was granted permission to use the documents disclosed by Barclays for the purposes of bringing claims against Barclays for breach of a duty of care at common law, breach of statutory duty and dishonest assistance.

CAN BANKERS BE HELD LIABLE FOR APP FRAUD?

Whilst the decision in *I.F.T* allows IFT to use the documents obtained under the Norwich Pharmacal application for the purposes of bringing a claim against Barclays, it does not discuss the claimant's likelihood of success in its proposed claims. If anything, para 13

of the judgment highlights the numerous problems which such a claimant faces. The paragraph reads as follows:

> "On the face of the arguments put before me there are or may be difficulties, … both with regard to the victim establishing even an arguable case of dishonesty, and in relation to the existence of a duty of care, or of a breach of statutory duty on the part of the bank, the need probably to take the existing authorities to the Supreme Court."

Breach of a duty of care

The question of whether a banker might owe a duty to its customer to protect that customer against fraud, even if that fraud was committed by someone who had authority to act on behalf of the company, was considered in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All E.R. 363. The claim in that case concerned the misappropriation of the majority of a £400,000 loan by the chairman of Quincecare. Steyn J considered the nature and extent of the duty of care owed by a bank to its customer at pgs 375 to 377 of his judgment. He held that the bank did owe its customer a duty, which he formulated in the following terms:

> "a banker must refrain from executing an order if and for as long as the banker is 'put on enquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate funds of the company."

He went on to say that the standard of that duty was that of an "ordinary prudent banker" which is not "too high a standard". Most significantly, he states that there is a delicate balance to be struck between on the one hand imposing too burdensome an obligation on bankers thus hampering the effective transacting of banking business unnecessarily and on the other hand guarding against the facilitation of fraud. Ultimately, Barclays Bank plc succeeded in its claim as none of the evidence put before Steyn J showed that they had any reason to suspect fraud and therefore they had not been "put on enquiry". It is worth noting that in this case, the chairman of Quincecare had skilfully presented a plausible veneer to the employees of the bank who executed his orders.

The *Quincecare* case established that although ordinarily a bank has a duty to carry out payment instructions coming from its customers promptly, if the bank has reason to suspect that the instructions (though genuine) are part of an attempt to misappropriate its customer's funds, it must put a stop to the transaction.

The case of *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50 was the first time an English court had held that the Quincecare duty had been breached. The Supreme Court upheld the High Court decision which found that the bank, Daiwa Capital Markets Europe Ltd (Daiwa), had breached its duty of care to Singularis Holdings Ltd (Singularis) as it had paid away US$204m in circumstances where there were glaring signs that would have put an ordinary banker on enquiry. Bloomberg reported on 31 May 2009 that the Saudi Monetary Authority had frozen the assets of Mr Al Sanea, the Chairman and sole shareholder of Singularis. Daiwa sold the shares it was holding on Singularis's behalf, repaid itself, leaving a balance of US$204m. By this time there was further evidence that both Singularis and Mr Al Sanea were insolvent. Notwithstanding this, Daiwa acted on Mr Al Sanea's instructions to transfer the entirety of the US$204m to two other entities controlled by Mr Al Sanea. The liquidators of Singularis sought to recover those sums for the benefit of its creditors.

In para 1 of the Supreme Court judgment, Lady Hale analysed the Quincecare duty as a specification of the implied term under s 13 of the Supply of Goods and Services Act 1982 that a bank will use reasonable skill and care "in and about executing the customer's orders". The Supreme Court rejected the argument that because Singularis was in effect a one-man company, Mr Al Sanea's actions were the sole cause of its losses. The Supreme Court upheld the trial judge's finding that Singularis's claim should be reduced by 25% for contributory negligence.

Singularis was followed in *Federal Republic of Nigeria v J.P. Morgan Chase Bank NA* [2019] EWHC 347 (Comm), [2019] EWCA Civ 1641, in which the Court of Appeal held that the core of the Quincecare duty was an obligation on the Bank to refrain from making a payment where it had reasonable grounds for believing that the payment was part of a fraudulent scheme. Moreover, the Quincecare duty usually required a bank to do more than merely refuse to comply with a payment instruction. In most cases, the bank would be under an obligation to take steps to resolve its concerns.

Most recently, there is the case of *Philipp v Barclays Bank UK Plc* [2021] EWHC 10 (Comm), which concerned an APP fraud whereby Mrs Philipp transferred £700,000 to a bank account in the United Arab Emirates because she was convinced by sophisticated fraudsters that by doing so she was assisting an investigation by the Financial Conduct Authority and the National Crime Agency.

Even though Mr Al Sanea was the chairman and sole shareholder of Daiwa, he was, in law, its agent (because there were other directors of Singularis). Therefore, the courts declined to collapse the distinction between Mr Al Sanea and Singularis. Mrs Philipp was, by contrast, acting on her own account. HHJ Russen in *Philipp v Barclays Bank UK Plc* held that the Quincecare duty ought not to be extended to such situations, but "should be confined to cases where the suspicion which has been raised (or objectively ought to have been raised) is one of attempted misappropriation of the customer's funds by an agent of the customer" (para 156). In reaching that conclusion, the judge was heavily influenced by the evidence before him as to banking practice at the time (March 2018). Moreover, HHJ Russen held that Barclays was not required to play "amateur detective" and Barclays had no reason to doubt the instructions given by Mrs Philipp and could not have been expected to know that she was being controlled by a fraudster. Mrs Philipp's claims were therefore struck out.

The individual claimants fared better in *Hamblin v World First Ltd* [2020] EWHC 2383. Mr and Mrs Hamblin had transferred £140,000 into a current account belonging to Moorwand NL Ltd (MNL) with World First Ltd (WFL). Mr and Mrs Hamblin believed that they were depositing funds which would be used for the purposes of high frequency foreign exchange dealings. Their funds were withdrawn by the fraudsters. The judge rejected WFL's attempt to strike out Mr and Mrs Hamblin's claim on the basis that it was reasonably arguable that WFL was in breach of the Quincecare duty *that it owed to MNL*. WFL had allowed the fraudsters to withdraw the funds despite the fact that MNL had no directors at the material time and where the account signatory had been the subject of identity theft by the fraudsters. Mr and Mrs Hamblin contended that there was a constructive trust in respect of the funds they had transferred to MNL and, as a consequence, they could sue WFL.

This line of cases establishes that even when a customer's agent or purported agent has authorised a payment, the paying bank still owes the customer a duty of care not to carry out that payment if it has reasonable grounds for believing that the payment is a fraud on the customer. However, there will have to be particular circumstances before a bank is held to have been put on enquiry.

What none of the cases have so far addressed is whether the receiving bank owes a duty of care to the payee. In general terms, English law resists the idea that an agent acting for one party might owe duties to the party on the opposite side of the transaction and where such duties are imposed they depend on an assumption of responsibility (see *Caliendo v Mischon de Reya* [2015] EWHC 4289 (Ch)). In *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, the Court of Appeal held that a receiving bank will not owe a duty of care in tort to a payer of funds save in exceptional circumstances. On the facts of that case general suspicions that two of the bank's clients might possibly be involved in money laundering were not sufficient, in the absence of particular suspicions about the two transactions that formed the subject matter of the case.

Banks receiving payments have, however, owed a duty of care to the payee in the past. Section 4 Cheques Act 1957 stated that banks collecting cheques for customers without title would not be liable if they had done so in good faith and without negligence. What amounted to negligence depended, to a large extent, on what normal good banking practice was at the time of the transaction in question: see *Architects of Wine Ltd v Barclays Bank PLC* [2007] EWCA Civ 239.

The duty of care under s 4 Cheques Act 1957 on receiving banks handling cheques was the result of statutory intervention. In the absence of legislative or regulatory intervention, it remains to be seen whether the courts will be prepared to find banks liable in "exceptional circumstances" in future.

Breach of statutory duty

The Payment Services Regulations 2017 are the principal source of rules relating to payments. They implement the Payment Services Directive 2015 (EU 2015/2366). They impose greater obligations on payment service providers in respect of customer information and the authentication of transactions. They do not, however, expressly deal with APP fraud.

A more promising route for customers might be to rely on breaches of banks' duties to prevent money laundering. Banks are subject to regulatory requirements to "know your customer" and to carry out due diligence to prevent money laundering: Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017/692. They are also subject to regulations which require them to have adequate policies and procedures to counter the risk of being used for financial crime: SYSC 6 FCA Handbook. On their face, however, these regulatory duties are owed to the FCA. It would require a regulatory decision to make them actionable by customers or a development of the law by the courts to incorporate them into the bank's duty to act with reasonable care and skill.

It is difficult to see a compelling reason why banks' existing duties to combat money laundering should not be actionable by their customers. Doing so would not turn them into insurers, it would merely give them incentives to comply with both the letter and the spirit of the anti-money laundering rules. The principal practical difficulty is the tipping-off offence, which places banks in difficulty if they stop a transaction: s 333A Proceeds of Crime Act 2002. The current approach generates vast numbers of "low quality" Suspicious Activity Reports but does little to prevent fraudsters obtaining the proceeds of their activities. The time has surely come to reconsider the wisdom of the tipping-off offence.

Banks are already required to play detective, under pain of committing a criminal offence if they fail to report money laundering which they had reasonable grounds to know or suspect even if they did not in fact do so: s 330(1) Proceeds of Crime Act 2002. Were banks to face a liability for failing to comply with their money laundering obligations, it would surely concentrate their minds on actually investigating suspicious transactions rather than simply filing box-ticking reports.

Dishonest assistance

A third route by which a bank might be held liable to a victim of APP fraud is on the ground of dishonest assistance. A party dishonestly assists in a transaction if they have sufficient knowledge to render their participation in the transaction contrary to normally acceptable standards of honest conduct: *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 WLR 1476, para 15 per Lord Hoffmann. Although the dishonest assister will often know that what he is doing is dishonest, that subjective understanding is not necessary. Deliberately closing one's eyes, in the sense of having suspicions of misfeasance but making a conscious decision not to ask questions or otherwise enquire, satisfies the test of dishonesty: *Royal Brunei Airlines Snd Bhd v Tan* [1995] 2 AC 378 , 389E-F per Lord Nicholls of Birkenhead.

Biog box
David McIlroy and Ruhi Sethi-Smith are both barristers at Forum Chambers (www.forumchambers.com) specialising in banking and financial services law and commercial disputes. David McIlroy is Visiting Professor of Banking Law at the Centre for Commercial Law Studies, Queen Mary University of London.
Email: dmcilroy@forumchambers.com and rsethi-smith@forumchambers.com

In *Singularis*, the claim against Daiwa was also advanced on the basis that Daiwa had dishonestly assisted Mr Al Sanea of Singularis in breach of his fiduciary duties in removing the money from the company to the detriment of the company's creditors. Rose J dismissed the claim for dishonest assistance because she held that Daiwa's employees had failed to ask the right questions or to draw the right conclusions regarding the transactions because of a lack of training and procedures rather than because they were turning a blind eye.

Magner v Royal Bank of Scotland International Ltd (Gibraltar) was a rare case in which a judge found a bank liable for dishonest assistance. The claimants were all customers of a law firm whose principals acted fraudulently. Although the judge dismissed allegations against six out of the seven officials accused of having dishonestly assisted the fraudsters, he found that one official had done so. He held that official ought to have concluded from movements between the law firm's client and official accounts that its principals were misusing client money. The Court of Appeal overturned his decision, describing the judge's findings against the official in question as "flawed from beginning to end", "unjustified and should not have been made". The Privy Council rejected the customers' appeal against that decision: *Magner v Royal Bank of Scotland International Ltd* [2020] UKPC 5.

Up until around twenty years ago, claimants would have found it easier to establish liability against banks. Banks were liable for knowing assistance rather than dishonest assistance. The focus of the court's enquiry was on whether a bank had knowledge of circumstances which would indicate the facts to an honest and reasonable man or would put an honest and reasonable man on enquiry: *Selangor United Rubber Estates Ltd v Cradock (No.3)* [1968] 1 WLR 1555 at 1590, *Baden Delvaux v Société Générale* [1992] All ER 161 at 235. The change from "knowing assistance" to "dishonest assistance" in *Royal Brunei Airlines v Tan* was fateful. The abandonment of the euphemism has raised a psychological barrier to judges holding a bank accountable where they have ignored their duties to prevent financial crime.

CONCLUSION

APP fraud is a significant problem and it has risen sharply since the start of the COVID-19 pandemic. Unlike fraudsters who are likely to have hidden the money even if they can be found, banks are sitting targets. The courts are understandably reluctant to place banks under any liability to customers for failing to prevent it. Companies, and others who are victims of fraud by their agents, are able to rely on the Quincecare duty to hold their own bank liable in cases where the bank ought to have stopped the transactions. *I.F.T S.A.L. Offshore v Barclays Bank PLC* shows that Norwich Pharmacal orders can be used to obtain documents, before a customer decides whether or not to bring a claim against a bank.

HHJ Russen QC's decision in *Philipp v Barclays Bank* leaves personal customers in the anomalous position of being deprived of the limited protection which the Quincecare duty provides to business customers. While the voluntary Contingent Reimbursement Model Code for Authorised Push Payment Scams introduced in May 2019 offers them the prospect of redress in some cases, it does not extend to international payments, which are, for obvious reasons, preferred by fraudsters.

On the authorities so far, establishing that the employees of a bank have dishonestly assisted a fraudster will only be possible on the clearest of facts.

Given the extent of the losses such fraud causes, courts and the regulators are going to be put under pressure to give customers a remedy in cases where a bank has acted in breach of clear requirements placed upon its business. The most likely area in which the law will develop is by rendering banks liable for breach of their money laundering obligations. The "Know Your Customer" requirements which banks are supposed to fulfil before allowing a customer to open an account are a good place to start. Just as those involved in organised crime use "burners", mobile phones which are used for a short period of time before being disposed of, so fraudsters put transactions through new accounts. It remains to be seen whether this fact or others will be enough to allow the claimants to succeed in *I.F.T S.A.L. Offshore v Barclays Bank PLC.* ■

Further Reading:

- Are the Quincecare floodgates opening for victims of fraud? (2020) 2 JIBFL 94.
- Payment instructions where there are reasonable suspicions of fraud (2019) 9 JIBFL 603.
- LexisPSL: Financial Services: News: Banks avoid tougher UK fraud protection duties, for now.